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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

HAROLD J. POWELL,

Defendant and Appellant.

A140738

(Sonoma County
Super. Ct. No. SCR640668)

Defendant and appellant Harold J. Powell (appellant) appeals from the judgment entered following his no contest plea to possession of stolen property (Pen. Code, § 496, subd. (a)).¹ He contends the trial court abused its discretion in failing to remove defense counsel on its own motion at the time of the sentencing hearing. We dismiss the appeal because appellant failed to obtain a certificate of probable cause.

BACKGROUND

In September 2013, the Sonoma County District Attorney's Office filed a complaint charging appellant with possession of stolen property (§ 496, subd. (a)) and alleging four prior prison terms (§ 667.5, subd. (b)). The charge was based upon discovery of stolen property in appellant's tent in an encampment of homeless people.

In November 2013, pursuant to a plea agreement, appellant pleaded no contest to possession of stolen property and admitted one of the prior prison term allegations; the other prior prison term allegations were dismissed. In December, the admitted prior

¹ All further statutory references are to the Penal Code unless otherwise indicated.

prison term allegation was stricken and the trial court imposed a sentence of 2 years in county jail under section 1170, subdivision (h).

Appellant requested a certificate of probable cause, which the trial court denied on January 6, 2014. On January 8, appellant filed a notice of appeal, specifying denial of a motion to suppress, ineffective assistance of counsel, and “plea entered by coercion [sic] and fraud” as grounds for appeal.² In July, appellant filed a petition for writ of mandate (case number A142324) requesting issuance of a writ directing the trial court to issue a certificate of probable cause; this court denied the petition.

DISCUSSION

Appellant contends the trial court abused its discretion by failing to remove defense counsel on its own motion at the time of the sentencing hearing. We dismiss the appeal because appellant failed to obtain a certificate of probable cause.

Appellant’s claims on appeal are based on a letter he submitted to the trial court before the sentencing hearing. In the letter, appellant denied knowingly possessing stolen property and claimed he pleaded no contest because defense counsel was “inept” and had “no trial tactic except to put [appellant] on the stand.” At the December 19, 2013 sentencing hearing, the trial court acknowledged receipt of the letter and asked defense counsel for a response. Defense counsel said he “vigorously disagree[d] with the allegations.” He also said appellant wanted to proceed with sentencing. Appellant told the court he wrote the letter because he had spoken to one of the people referenced in the police reports, and the person told appellant he did not make statements attributed to him in the reports.

On appeal, appellant argues the letter put the trial court on “notice” that appellant claimed he was innocent and entry of his plea was due to his counsel’s ineffectiveness. Appellant contends this obligated the court to exercise its discretion to remove counsel “in order to eliminate potential conflicts, ensure adequate representation, or prevent substantial impairment of court proceedings.” (*People v. McKenzie* (1983) 34 Cal.3d

² In his opening brief appellant raises no issue on appeal regarding denial of a motion to suppress evidence.

616, 629, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal. 4th 346, 364–365.)

Respondent argues the present appeal must be dismissed under section 1237.5 because appellant failed to secure a certificate of probable cause from the trial court. Section 1237.5 provides that “[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where” the defendant has filed a statement with the trial court showing “grounds going to the legality of the proceedings” and “[t]he trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.” (See *People v. Buttram* (2003) 30 Cal.4th 773, 780.) The California Supreme Court has further explained “that two types of issues may be raised on appeal following a guilty or nolo plea without the need for a certificate: issues relating to the validity of a search and seizure, for which an appeal is provided under section 1538.5, subdivision (m), and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.” (*Buttram*, at p. 780.)

Appellant contends no certificate of probable cause is required for the present appeal. He argues he is not attacking the validity of the plea “but instead, is challenging only the failure of the trial court to remove defense counsel on its own motion.” However, the underlying premise of appellant’s claim is that defense counsel should have been removed because appellant’s conflict with counsel and/or counsel’s ineffectiveness undermined the validity of the plea. Appellant does not argue the trial court’s failure to remove defense counsel had any impact on sentencing, and he fails to provide any reasoned argument or cite any authority that a certificate of probable cause is unnecessary in the circumstances of the present case. (See *People v. Stubbs* (1998) 61 Cal.App.4th 243, 244–245 [claim based on counsel’s performance prior to the entry of the plea attacks

the validity of the plea and requires certificate of probable cause].) Because appellant has not shown his claim is a non-certificate claim, his appeal must be dismissed.³

In any event, the trial court did not abuse its discretion. Defense counsel indicated he discussed appellant's letter with appellant, and appellant wished to proceed with sentencing. Appellant personally addressed the court and did not express disapproval of or conflict with defense counsel. The trial court pointed out that the negotiated maximum sentence was relatively favorable for appellant. The circumstances did not obligate the trial court to remove defense counsel under *McKenzie, supra*, 34 Cal.3d at page 629 and its progeny.

DISPOSITION

The appeal is dismissed.

³ Appellant also argues the trial court "impliedly certified good cause for the appeal" because the court certified the record on appeal, citing *People v. Holland* (1978) 23 Cal.3d 77. Even assuming *Holland* is still good law (see *People v. Mendez* (1999) 19 Cal.4th 1084, 1098 & fn. 9), *Holland* is distinguishable because in the present case the trial court *expressly and unambiguously denied* appellant's request for a certificate of probable cause as to his claim on appeal; the circumstances in *Holland* were much more ambiguous. (*Holland*, at p. 85 & fns. 8 & 9.)

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.